UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 93-53-P-C***
	)	
ROBERT A. BOUTHOT,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Robert A. Bouthot moves this court to vacate and set aside his plea of guilty pursuant to 28 U.S.C. § 2255. Bouthot pleaded guilty to a charge of conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841 and 846. He contends that his plea was not knowing and voluntary, because he expected a much smaller quantity of cocaine to form the basis for sentencing, and that he received ineffective assistance of counsel because his counsel at the time did not inform him concerning the possible effect of United States Sentencing Commission Guideline ("U.S.S.G.") 1B1.3 and did not object at the time of sentencing to the court's calculation of the amount of cocaine to be used as the basis for sentencing.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that Bouthot's allegations are insufficient to justify relief even if accepted as true,

and accordingly I recommend that his motion be denied without an evidentiary hearing.

I. Background

As the First Circuit noted on direct appeal of this matter, the underlying criminal case implicated three co-defendants who were involved in a cocaine distribution ring centered in Portland, Maine. *United States v. Webster*, 54 F.3d 1, 3 (1st Cir. 1995). Bouthot pleaded guilty to the only count with which he was charged, conspiracy to possess cocaine with intent to distribute, 21 U.S.C. §§ 841, 846. *Id*. at 5. This plea was tendered on February 18, 1994. Transcript of Proceedings, *United States v. Bouthot*, Docket No. 93-53-P-C ("Tr."), at 1. The Prosecution Version offered at the plea hearing (Docket No. 68), which Bouthot admitted was accurate, Tr. at 12-13, states, *inter alia*, "On several occasions between December 1992 and March 25, 1993, Anthony F. Webster supplied cocaine to Robert H. [sic] Bouthot. Bouthot resold the cocaine to various other people (including Ronald Hansen, David Conwell, and Louise Therrien), and paid Webster for the cocaine from the proceeds of these sales." There was no plea agreement. Tr. at 14.

A presentence conference was held on June 6, 1994 at which the report of the presentence investigation was discussed. Tr. at 20-29. The report, based on a police investigation and interviews with two of Bouthot's co-defendants, attributed 755.15 grams of cocaine to Bouthot for purposes of application of the sentencing guidelines. Presentence Investigation Report, *United States v. Bouthot*, Docket No. 93-53-P-C-03 (5/16/94) at 5. The report recommended an upward adjustment in the offense level because Bouthot had paid for a hotel room for another individual who undertook cocaine sales on commission for Bouthot, and no downward adjustment for acceptance of responsibility due to the difference between the amounts of cocaine attributed to him by his co-defendants and the amounts that he admitted handling. *Id.* at 6-7. The total offense level set out in

the report was 28. *Id*. at 7. At the presentence conference, Bouthot's counsel contended that the correct amount of cocaine was 198.45 grams, challenged the enhancement, and requested reductions for acceptance of responsibility and status as a minor participant. Tr. 21, 23. He requested a testimonial sentencing hearing. *Id*. at 26.

At the sentencing hearing, Bouthot's co-defendant Webster testified that he had provided Bouthot with from one to three ounces of cocaine three times a month for a period of fourteen months and that Bouthot had accompanied him on seven trips to New York City to obtain cocaine during this time period. *Id.* at 36-37, 40-41. On one of these trips, they brought a half kilogram (or eighteen ounces) back with them; on all other trips they returned with six to twelve ounces. *Id.* at 42-43, 74. Webster also testified that Bouthot was paying for a hotel room for David Conwell, and that Bouthot was also paying Conwell $10 for every 1/16th ounce of cocaine that Conwell sold for Bouthot. *Id.* at 38-39. Bouthot also testified at the hearing, denying that Webster regularly supplied him with cocaine, that he had made more than one trip to New York with Webster, that he had been present on the half-kilo trip, and that Conwell had sold cocaine for him. *Id.* at 89-90, 92-93, 96, 97.

The court accepted Webster's testimony and based Bouthot's sentence on 3.83 kilograms of cocaine, a base offense level of 30 under the guidelines. *Id.* at 117-18. The offense level was increased by two due to Bouthot's arrangement with Conwell. *Id.* at 119-20. The requests for reduction were denied. *Id*. at 120-21. The court imposed a sentence of 151 months, which was the low end of the applicable range under the guidelines. *Id.* at 121-22. On motion of the government, Bouthot's sentence was reduced by the court on September 13, 1995 to 120 months. Docket No. 117.

On his direct appeal, Bouthot challenged Webster's testimony as unreliable as a basis for

establishing the quantity of cocaine. *Webster*, 54 F.3d at 5. He also challenged the court's method of computing the cocaine amount for purposes of sentencing, the upward adjustment and the denial of a reduction for accepting responsibility. *Id.* at 5-6. The First Circuit upheld the sentencing court on all points and noted that Bouthot had waived the issue of the method of computation by failing to object at the time of sentencing, although it nonetheless upheld the chosen methodology, finding no clear error. *Id.*

Bouthot filed his motion under section 2255 on August 22, 1996 in two parts: the first, signed by his lawyer, asserts that his plea was not knowing and voluntary, due to his expectations about the upper limit of the sentence that would be imposed, and that the assistance of his counsel at the time of sentencing was ineffective; the second, unsigned and apparently written by Bouthot, elaborates on the ineffective-assistance-of-counsel claim and asserts that the sentencing court failed to comply with Fed. R. Crim. P. 11.[1] Docket No. 115. The government response suggests that this court lacks jurisdiction to hear the claims concerning voluntariness of the plea and adequacy of defense counsel's work to the extent that these claims are based on the drug quantities found in the Presentence Investigation Report and by the court after hearing because the propriety of the drug quantity determination was the subject of Bouthot's direct appeal of his sentence and because any other issues raised in the motions could have been raised on the direct appeal. On the merits, the government asserts that Bouthot's motion fails to meet the legal standards entitling individuals to relief on such claims.

[1] Both Bouthot and his counsel refer to Fed. R. Crim. P. 32(e) in their pleadings. However, it is clear from the language of that rule that it applies only to motions to withdraw guilty pleas made before sentence is imposed and that 28 U.S.C. § 2255 applies to motions to set aside a plea made after sentence is imposed and after direct appeal. The statutory route has its own standard of review, distinct from that applicable to Rule 32 motions. It is the statutory standard that applies here.

Rule 2(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts requires that a motion seeking relief "shall be signed under penalty of perjury by the petitioner." Neither Bouthot nor his counsel signed their motions under penalty of perjury. The government therefore requested dismissal of the petition. On January 17, 1997 counsel for the petitioner moved for leave to supplement the pleadings by addition of his own sworn statement concerning Bouthot's place of incarceration, the identity of the warden of that institution, and the fact that the statements included in the motion filed on August 22, 1996 and signed by counsel were true and correct. Docket No. 125. The government has not objected to this motion and I thus grant it.[2]

II. Voluntariness of Plea

Bouthot argues that his guilty plea was involuntary because the amount of cocaine used to establish his sentence under the guidelines was "grossly in excess" of his expectations when he entered his plea. Motion to Vacate and Set Aside Guilty Plea (Docket No. 115) ("Sworn Motion") at 3. His counsel on this motion swears that Bouthot's trial counsel did not discuss with Bouthot before sentencing the possible effect of U.S.S.G. 1B1.3.[3] *Id*.; Supplemental Pleadings (Docket No. 125). Bouthot asserts that his lack of awareness of the consequences of his plea renders it involuntary, citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *United States v. Cotal-*

[2] The government no longer objects to the sufficiency of the filing of the motion on the grounds of lack of verification. It maintains its objection to the extent that necessary factual predicates to any of Bouthot's claims are not sworn.

[3] Section 1B1.3 of the Sentencing Guidelines defines relevant conduct by the defendant that may be used in determining the base offense level to include, *inter alia*, all acts committed, aided, or induced by the defendant, and all reasonably foreseeable acts of other participants in furtherance of jointly undertaken criminal activity, during the commission of the offense of conviction and in preparing for that offense. United States Sentencing Commission, *Guidelines Manual* (1993) at 16.

Crespo, 47 F.3d 1, 4 (1st Cir. 1995); and *United States v. Allard*, 926 F.2d 1237, 1244-45 (1st Cir. 1991). However, each of these cases concerns the direct appeal of the denial of a motion to change a plea, not a collateral attack on the voluntary nature of the plea, and each deals with the adequacy of the Rule 11 hearing at which the defendant made his plea. The legal standard applicable to efforts to set aside a guilty plea that are initiated after sentence is imposed differs from that applicable to review of such motions made before sentencing. *United States v. Japa*, 994 F.2d 899, 902 (1st Cir. 1993). In the former instance, which is presented here, the defendant must prove that the alleged violation amounts to "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." *Id.* (citations omitted). Bouthot's motion does not even begin to suggest that he could prove either alternative.

Bouthot does attack the adequacy of his Rule 11 hearing, but only in the unsigned and unsworn portion of his motion. Docket No. 115. Facts alluded to in an unsworn memorandum will not suffice to support a section 2255 motion. *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995). Even if the court were to assume that Bouthot's current counsel meant to swear that those statements, as well as those made in the pleading which he signed, were true and correct when he filed the supplemental pleading (Docket No. 125), there is no showing in the supplemental pleading that he has any personal knowledge concerning those factual assertions. Therefore, those assertions cannot form the basis for a section 2255 motion. *See Barrett v. United States*, 965 F.2d 1184, 1995-96 (1st Cir. 1992) (section 2255 motion based on claim of newly discovered evidence).

In any event, Bouthot's challenge to the Rule 11 hearing would not succeed on the merits; each of the requirements of the rule was fully addressed at the sentencing hearing. Bouthot asserts that the court failed to comply with Rule 11(c)(1), but the court clearly informed Bouthot about the

maximum possible penalty provided by law and the fact that it was required to consider any applicable sentencing guidelines but could depart from them under some circumstances. Tr. at 9-10, 14-16. Nothing further is required. *See generally United States v. Raineri*, 42 F.3d 36, 41-42 (1st Cir, 1994). Bouthot also claims that the court failed to comply with Rule 11(d), but the court clearly addressed each required element of that section of Rule 11. Tr. at 4, 13-14, 16-17. Again, nothing further is required. *United States v. Martinez-Martinez*, 69 F.3d 1215, 1223 (1st Cir. 1995). Finally, Bouthot argues that the court failed to comply with Rule 11(f), but the court clearly made an adequate inquiry to determine that there was a factual basis for the plea. Tr. at 10-13. Bouthot confuses the existence of a factual basis for the charge, which he does not dispute, Motion to Vacate and Set Aside Plea Pursuant to 28 U.S.C. § 2255, Fed. R. Crim P.; Memorandum of Law in Support Thereof (Docket No. 115) ("Unsworn Motion") at 8-9, with the basis for calculation of sentence, which is not the subject of Rule 11 or the Rule 11 hearing.

Bouthot also argues that his plea was involuntary, independent of the Rule 11 issue, due to the difference between his expectations and the actual sentence imposed.

> Generally, the imposition of a sentence greater than that expected by a defendant, or predicted by his counsel is not adequate grounds for vacating the sentence under 28 U.S.C. § 2255. Only if a defendant can show that his plea was coerced, or induced by false promises, or made without comprehension of the charge against him is he late [sic] permitted to argue that his plea was not "voluntary."

Calabrese v. United States, 507 F.2d 259, 260 (1st Cir. 1974) (sentence imposed was five years longer than "expected" sentence) (citations omitted). Bouthot makes no showing whatever to suggest that his plea was made without comprehension of the charge against him. He asserts in his unsigned and unsworn petition in conclusory fashion that "Defense counsel coerced this movant into

changing his plea to guilty through false promises," Unsworn Motion at 6, but the record is devoid of any factual support for this statement. Indeed, the only sworn evidence, Bouthot's statements at the Rule 11 hearing, is directly to the contrary. Tr. at 4-17.

As to the voluntary nature of his plea, Bouthot has shown no fundamental defect which inherently results in a complete miscarriage of justice, not has he shown an omission inconsistent with the rudimentary demands of fair procedure.

III. Ineffective Assistance of Counsel

Bouthot asserts that he suffered the ineffective assistance of counsel because his trial counsel did not discuss U.S.S.G. 1B1.3 with him before sentencing, failed to object to the alleged violations of Rule 11 at the plea hearing, and failed to appeal on the grounds of the Rule 11 violations. The latter two allegations are made only in the unsigned and unsworn portion of Bouthot's motion and thus may not provide the basis for a section 2255 motion. *LaBonte*, 70 F.3d at 1413. In support of his motion on this issue, Bouthot appropriately invokes the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. The *Strickland* test applies to cases that are resolved by guilty plea rather than trial. *Hill*

v. Lockhart, 474 U.S. 52, 58 (1985). To satisfy the "prejudice" requirement in such a context, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 59. In a case alleging ineffective assistance in connection purely with the sentencing phase of a criminal proceeding, the "prejudice" requirement demands a showing of "a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Smullen v. United States*, 94 F.3d 20, 23 (1st Cir. 1996).

Bouthot essentially argues that his attorney made an incorrect prediction of his likely sentence. "An attorney's inaccurate prediction of his client's probable sentence, standing alone, will not satisfy the prejudice prong of the ineffective assistance test." *LaBonte*, 70 F.3d at 1413 (citation omitted). Bouthot does assert that, but for the erroneous advice about the likely sentence, he would have entered a plea of not guilty and insisted upon a trial. Sworn Motion at 4. However, such a protestation is inadequate unless accompanied by a claim of innocence or the articulation of a plausible defense that he could have raised at trial. *LaBonte*, 70 F.3d at 1413. Even in his unsworn and unsigned submission, Bouthot makes neither assertion. Therefore, his claim of ineffective assistance on this ground must fail.

Even if the remaining two grounds for this claim were properly presented in Bouthot's motion, the claim would fail. Because the court committed no error in the Rule 11 proceeding, as noted above, objection at the time and appeal on that issue would have been fruitless. No showing of prejudice can be made on this issue on this record. *Strickland*, 466 U.S. at 687.

IV. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 11th day of February, 1997.

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David M. Cohen
United States Magistrate Judge